Humes Electric, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 428. Case 31-CA-10354

September 20, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On February 17, 1982, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and also resubmitted its trial brief. The General Counsel then filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order, as modified herein.

Although we agree with the Administrative Law Judge that Respondent violated Section 8(a)(1) and (3) of the Act by discharging James Devers, we do so for the reasons set out below.

Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is well settled that the Board will not displace an administrative law judge's credibility resolutions which are based on his observation of demeanor unless a clear preponderance of all the relevant evidence convinces us that they are incorrect.[1] When a clear preponderance of all the relevant evidence leads to a contrary conclusion, however, the factor of demeanor is diminished significantly.[2] And, as we have had occasion to point out, in any event the ultimate choice between conflicting testimony rests not only on the witnesses' demeanor, but also on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole.[3]

In the instant case, although the Administrative Law Judge referred generally to the demeanor factor, certain credibility resolutions do not appear to have been based on his observations of the witnesses' testimonial demeanor. Furthermore, the record sustains Respondent's contention that the Administrative Law Judge may have misstated or confused certain of the relevant record evidence and testimony presented in this case.[4] Given such circumstances, we find it necessary to examine the record *de novo* and to make credibility findings, when appropriate, that comport with the record evidence as a whole and with the inferences fairly drawn therefrom.[5] As noted, however, we agree with the Administrative Law Judge that Devers' discharge violated the Act.

Devers was dispatched by the Union on July 14, 1980,[6] along with two other union members, to compose a crew of linemen upgrading the U.S. Navy's electrification system at the Elk Hills Naval Petroleum Reserve (Elk Hills). The crew's job entailed primarily setting poles and stringing wire. Devers was his crew's nominal foreman until

[1] *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

[2] *El Rancho Market*, 235 NLRB 468, 470 (1978), enfd. 603 F.2d 223 (9th Cir. 1979).

[3] *Northridge Knitting Mills, Inc.*, 223 NLRB 230 (1976); *Warren L. Rose Castings, Inc. d/b/a V & W Castings*, 231 NLRB 912 (1977), enfd. 587 F.2d 1005 (9th Cir. 1978).

[4] Thus, in adopting the Administrative Law Judge's Decision, we do not rely on a number of factors he discussed. First, we do not rely on the Administrative Law Judge's finding of a contradiction between Respondent Vice President Geissel's testimony that he had received daily complaints from General Foreman Ingram starting on July 21 and Ingram's testimony that he did not begin to register complaints with Geissel about employee James Devers until "toward the end of July." In the context of this case, we are satisfied that the dates quoted are not so distant as to constitute a contradiction.

Second, the Administrative Law Judge found that Geissel's statement that he had not admonished Devers or his crew when he caught them standing around idly on the job on or about July 29 was inconsistent with Geissel's assertion that he spoke to Devers' crew about the necessity of "cooperation on the job" on the same occasion. We do not rely on the Administrative Law Judge's finding because, to the contrary, we do not find that Geissel's statement about "cooperation on the job" necessarily constituted an admonition.

Third, we disavow reliance on the Administrative Law Judge's finding that Geissel's statement that Devers' crew "most likely" saw him observing their malingering on July 29 was inconsistent with his testimony that he asked them if there were any problems. The Administrative Law Judge concluded that these statements exemplify the "tell-tale inconsistency" in Geissel's testimony. To the contrary, we find that Geissel's assertion that Devers and his crew "most likely" saw him was in reference to his observation of their conduct from a distance, not in reference to his subsequent conversation with Devers at the worksite in question. Hence, we do not find that Geissel's statements reflect an inconsistency.

[5] For example, with respect to the topography at the Elk Hills project, the Administrative Law Judge concluded that "Ingram's insistence that 'all the terrain is on flat land' until after Devers was discharged was so at odds with the weight of evidence as to reveal an intent to mislead." Ingram had testified that "[p]rior to [Devers'] discharge, all the terrain is on flatland." After an examination of the record testimony, we conclude that Ingram's testimony was in large part consistent with, or corroborated by, another witness' testimony. Because Respondent's estimator, Parrent, also testified that as of the August 11 meeting [the day before Devers' discharge], "we weren't working in any bad terrain," we find that Ingram should not have been discredited on this point. Thus, we do not credit Devers' testimony on the topography over that of the other witnesses to the extent that the Administrative Law Judge may have relied on it to describe the topography before Devers' discharge. Nevertheless, we note that even though the Administrative Law Judge discredited Ingram's testimony erroneously on this matter, his overall analysis of the nature of the terrain was correct, as exemplified in his statement that "substantial portions of the work *were to be done* in difficult terrain [emphasis supplied]." Contrary to Respondent's assertions, the Administrative Law Judge's conclusions clearly addressed the difficulty of the terrain to be encountered by Devers' crew, not the terrain already worked by them. (See fn. 3, first sentence of the Administrative Law Judge's Decision in that regard.)

[6] All dates are in 1980 unless indicated otherwise.

August 11, when he became simply a journeyman lineman. Because he had worked as the Union's business manager for the preceding 3 years, Devers admittedly was "three years soft" at the time of his dispatch to Elk Hills.

Upon first viewing the worksite, Devers (who also was the union steward) informed Haskell Ingram, the general foreman, that Respondent was "going to have to heavy up the crews" (i.e., increase the crew size) because of the rough terrain and the large poles involved. As work progressed on the project, Devers continued to express his concern about crew size to Ingram. Ingram's usual response was that he would "take care of it." Devers also informed Al Fitts, the Union's business representative, of his concern regarding the crew size, but, because of the assurances Ingram had given him, he added that the problem was "taken care of."

On August 6, Ingram talked to Devers about Respondent's and the Navy's concern about Devers' alleged unsatisfactory production level. Devers allegedly responded, "Fuck those people." Ingram then informed William Geissel, Respondent's vice president, of Devers' response and the two allegedly decided to discharge him after work on August 7. Although Respondent allegedly has a strong policy of discharging unacceptable employees on paydays (the next payday being August 12), it contended that it was willing to make an exception and terminate Devers before payday because it characterized his response as outrageous. However, Devers was not discharged on August 7. Respondent claimed that the preplanned discharge was not effectuated on August 7 because Devers was absent from work on August 7 and 8 due to illness. Devers was not told of the impending discharge when he called in sick on August 7.

When the crew size had not been increased by August 8, Devers, though absent from work due to illness, told Fitts that the terrain was "unreal" and the work "unsafe." Fitts then phoned Geissel and, without naming the complainant, informed him that the workers were griping about the shorthanded crews. A meeting was set for Monday, August 11, at Respondent's suggestion, to resolve the problem.

Devers reported for work on August 11, still not having been told of his alleged impending discharge. He and Fitts met with Respondent officials at the worksite that morning. Devers participated actively in the discussion as a proponent for larger work crews, and requested that Respondent "unforeman" him to allay any suspicion that his advocacy of larger crew sizes reflected a desire to "stand around." The only reasons proffered for the larger crew size were the rough terrain and the large size of the poles. The participants agreed upon the formation of one crew of up to 10 linemen under one nonworking foreman. The agreement was implemented immediately and Devers returned to rank-and-file status that day.[7]

The next day, August 12, a payday, Geissel informed the Union's business manager that Respondent was going "to let Jim go" for the following reasons: Devers had "a negative effect on the people on the job"; Respondent had "no control over the job" because of Devers' "influence over the people"; and Devers' crew production level "was not there." When asked if Devers had been confronted about these matters, Geissel responded that he had not. Additionally, no final check had been prepared before August 12. Devers received his termination slip at the end of his shift on August 12; the slip gave no reason for the discharge, but stated that a letter was to follow. Surprised at having been terminated, Devers asked Ingram if it had to do with his work and was informed that his work had been "all right" and that the decision had emanated "from the office."

When the linemen protested the discharge on August 13 by refusing to work, a meeting was held between union and management officials, at which time "lack of production" and "attitude" were given as the reasons for Devers' discharge. Devers never was offered rehire at the site.

As noted, Respondent asserts that it had a legitimate business reason for discharging Devers—namely, his lack of productivity. Unlike the Administrative Law Judge, we find that Respondent presented sufficient evidence that it had legitimate concerns about Devers' productivity on the Elk Hills project.[8] Although it is uncontroverted that Devers' productivity was acceptable during the first week of his employment as foreman at the Elk Hills worksite, Respondent quickly became disenchanted with Devers' work. Thus, Respondent presented credible evidence that it complained to

[7] Respondent had intended to increase the number of its employees, but the increase on August 11 (as a result of the worksite meeting) admittedly came earlier than planned and hence increased Respondent's payroll earlier.

[8] Respondent excepted to the Administrative Law Judge's crediting of Union Business Manager Croxton's version of his telephone conversation of late July with Respondent's president and owner, Reed, over that of Reed, and to the Administrative Law Judge's conclusion that Reed declined to tell Croxton that the "particular problem" Respondent was having with Devers concerned his lack of productivity. According to Reed, Croxton suggested that he approach General Foreman Pence, a close friend of Devers', to request that Pence speak with Devers about his lack of productivity. To the contrary, Croxton testified that, although Reed disclosed that he "had a problem with" Devers, he never disclosed the nature of such problem. Nevertheless, because Croxton testified that he "very well could have" suggested that Reed ask Pence to approach Devers, we find that the aforementioned testimony exemplifies that Respondent did apprise a union official of its *concern* about Devers' productivity in late July.

Devers about his productivity on August 6. Indeed, Devers' recognition that his productivity was in question is apparent from his response to his notice of termination. When Ingram presented him with the termination slip, Devers inquired, "Is it my work?" When Ingram responded in the negative, Devers inquired once again, "Are you sure it is not my work?"

Nevertheless, as did the Administrative Law Judge, we find that the decision to terminate Devers on August 12 was not grounded in Respondent's concern for his alleged lack of production, but rather in his participation in the joint meeting of union and management officials on the subject of crew size on August 11, and, more particularly, in his pursuit, as job steward, of larger crews. Despite Devers' request at that meeting that his foreman status be removed, so as to allay any suspicions that his advocacy of an enlarged crew size reflected a desire to attain a nonworking foreman status, Respondent's vice president characterized his efforts as "featherbedding."

Further, like the Administrative Law Judge, we find it incredible that Respondent planned to terminate Devers on August 7, but deferred the discharge until August 12 because of Devers' illness on August 7 and 8, and that it then terminated him on August 12 because of its computerized payroll system and longstanding custom of discharging employees on a payday. Geissel contended that he did not inform Devers of the impending discharge when Devers spoke to Geissel personally upon calling in ill on August 7 because that was considered to be the foreman's task. Likewise, Geissel did not instruct Ingram to phone Devers at home to relay the discharge decision because of Respondent's alleged practice of discharging employees on the job only. Furthermore, Respondent did not discharge Devers on Monday, August 11, when he returned to work nor the morning of August 12 because of the alleged administrative hassle. Respondent alleged that it decided, upon Devers' return on August 11, that he could be tolerated "one more day"[9] in order to prevent the women in the office from having to write up a specific check (rather than using the computer payroll) and to ensure that the termination was effectuated on a payday.

In sum, we find that the General Counsel has made out a *prima facie* case and that Respondent has not established that Devers' discharge would have occurred absent his participation in the August 11 worksite meeting.[10] Had Respondent been resolute in its alleged August 6 decision to discharge Devers on August 7, it clearly would have implemented the discharge prior to August 12. Although Respondent had legitimate concerns with Devers' work output, we find that his lack of productivity was blown up out of proportion by Respondent to veil the solution which Respondent desired: namely, Devers' discharge because of his participation in the August 11 meeting and his advocacy of change contrary to Respondent's economic interests.[11] Contrary to Respondent's assertions, we find that the timing of Devers' discharge right after the worksite meeting was less than "coincidental."

Accordingly, for the reasons noted above, we find that Respondent's discharge of James Devers violated Section 8(a)(1) and (3) of the Act.[12]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that Respondent, Humes Electric, Inc., Taft, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recomended Order, as so modified:

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its files any reference to the discharge of James Devers and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions,

[9] Respondent ostensibly characterized this as "one more day" rather than 2 more days (Respondent allowed Devers to work on both Monday and Tuesday before his discharge) because, in any event, it was obligated to pay Devers for a partial workday on Monday. The relevant contract provided that any person reporting for work and laid off who had not been notified of the layoff on the previous day would receive not less than 4 hours wages for the day.

[10] See *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

[11] See fn. 7, *supra*, and accompanying text.

[12] The Administrative Law Judge found, and we agree, that Respondent discharged James Devers unlawfully on August 12, 1980. In accordance with our decision in *Sterling Sugars, Inc.*, 261 NLRB 472 (1982), we shall order the expunction of any reference to this discharge from Respondent's files.

the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discharge or otherwise discriminate against employees because of their union or concerted activities protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under the Act.

WE WILL offer to James Devers immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority and other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of earnings or benefits suffered by reason of his unlawful discharge, with interest on lost earnings.

WE WILL expunge from our files any reference to the discharge of James Devers and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

HUMES ELECTRIC, INC.

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge: This matter was heard before me in Bakersfield, California, on May 21 and 22, 1981. The charge was filed on August 27, 1980, by International Brotherhood of Electrical Workers, Local Union No. 428 (herein the Union). The complaint issued on October 30, was amended during the hearing, and alleges that Humes Electric, Inc. (herein Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, when it discharged James Devers on August 12, 1980.

I. JURISDICTION

Respondent, a California corporation headquartered in the city of Taft, is an electrical contractor in the construction industry. It belongs to the Kern County Chapter, National Electrical Contractors Association (herein NECA), which represents its members in negotiating collective-bargaining contracts with labor organizations, including the Union. Those members, in the aggregate, annually take delivery of goods and materials valued in excess of $50,000 either directly from outside California or from sources within California which obtained them directly from outside the State.

Respondent, as a member of NECA, is an employer engaged in and affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED VIOLATION

A. *Evidence*

In July 1980, Respondent began to perform under a contract with the U.S. Navy to upgrade the electrification system of the Elk Hills Naval Petroleum Reserve, near Bakersfield. The project was to entail the setting of 2,000 poles and the stringing of 2 million feet of wire.

The first linemen on the job were Devers and two others, Dunsworth and Paynter. They were dispatched by the Union on July 14 and, until crew makeup was altered on August 11, comprised one crew. Devers was the crew's nominal foreman until August 11, after which he was simply a journeyman lineman until discharged on August 12. He was the Union's steward as well, although communication of that fact to Respondent was left to chance.[1] Devers had not worked in the field the 3 years preceding, having been the Union's business manager from July 1977 to July 1980. He was, as he put it, "three years soft."

Another three linemen were dispatched about a week after Devers, Dunsworth, and Paynter, making up a second crew. Its nominal foreman was a man named Orloff. Haskell (Hack) Ingram, general foreman, was over both crews.[2]

---

[1] Respondent and the Union were party to two labor contracts at relevant times, one covering line construction work and one covering oilfield electrical construction work. It apparently had not determined, at the outset of the project, which contract would govern. Both contracts gave the Union "the right to appoint a steward," and provided: "Notification of the steward's appointment shall be made, in writing, to the Employer by the Union." The Union ignored this procedure as concerns Devers' appointment, which, according to Al Fitts, its business representative, is not unusual.

[2] Respondent contends that Devers, while a foreman, was a statutory supervisor. Both labor contracts required, in the circumstances here obtaining, that one crew member be designated foreman and that "workers are not to take directions or orders . . . from anyone except the proper foreman." Ingram testified that Devers, "the elder man," was deemed foreman of his crew although Ingram "may not have come right out and said, 'You are foreman.'"

Devers' realization that he was foreman came on the first payday, when his check disclosed that he was receiving foreman's scale of $18.76 per hour rather than the journeyman rate $17.05. For the first 10 days or so, Ingram admittedly "showed the crew that work had to be performed" and spent much of the workday "in the near vicinity of the crew," giving "specific orders" to the linemen. He continued to "line the work out" after that, and to situate himself so the crews (Devers' and Orloff's) "were all visible" to him, but apparently left it to the foremen to

Continued

Although the first several days did not hold forth the prospect of any particular difficulty, Devers told Ingram upon first seeing the site that Respondent was "going to have to heavy up the crews"--i.e., get more men—because of the troubles bound to derive from the rough terrain and the large size of the poles to be used.[3] Devers, explaining the need for larger crews in such circumstances, testified:

> [W]hen you are in rough terrain like that, and it is a heavy pole, one man is on the truck, one man is trying to give signals, and one man is trying to wrestle that pole in[to] the ground. Because a lot of times, the way the trucks was set, the man could not see, the operator that was operating the boom could not see, unless there was a man giving signals. . . . [W]hen you are trying to set a pole hanging off a hill, and you have got one man wrestling a big-butted pole, and one man operating the truck, and one man trying to give signals, it is hazardous . . . [to] the man that is hanging onto the butt of the pole. . . . [H]e is the one that could get slapped up against the pole or up against the truck, caught between the truck and the—

Devers continued to express the need for larger crews "as time went on," conveying not only his concern, but also that related to him by the others on his crew and by Orloff. Ingram's usual response was to the effect that he would "take care of it."[4]

Early in the job, Devers also mentioned to Al Fitts, the Union's business representative, that there would be a need to "heavy up" the crews. Because of Ingram's assurances that he would take care of it, however, Devers added that the problem was "taken care of."

On Friday, August 8, nothing having changed as concerning the crews, Devers reported to Fitts that the terrain was "unreal" and the work "unsafe"; and that it consequently was essential to "heavy up the crews." Fitts thereupon had a telephone conversation with William Geissel, Respondent's vice president, telling him "there had been guys coming into the hall and complaining that they were working shorthanded." Fitts did not identify the complainants by name. They agreed to meet at the site the next Monday morning, August 11, to "straighten out" the problem.

Early on the morning of August 11, Fitts and Devers met at the site with Ingram and Ron Parrent, Respondent's estimator. Parrent substituted for Geissel, who had been summoned elsewhere on short notice to deal with a jurisdictional dispute. Devers was an active participant, espousing larger crews and asking that Respondent "unforeman" him to allay any suspicion that his purpose in pressing that position was "so I could stand around." Despite that, and although neither Devers nor Fitts otherwise indicated that the Union's position was based on anything but the terrain and "the big poles," Parrent told Geissel that evening that Devers and Orloff wanted larger crews so they could be nonworking foremen.[5]

The meeting lasted over an hour, resulting in an agreement that there would be 1 crew of up to 10 linemen, under 1 nonworking foreman. The foreman was to be Ivan Reit, Devers and Orloff reverting to rank-and-file status. The agreement became effective that same day.

Parrent and Ingram both proffessed ignorance of Devers' being steward. Neither, however, challenged his standing to participate in the meeting. Parrent explained: "I had seen Jim at so many meetings in the past that I just never thought anything about it."

Geissel visited the site that afternoon, learning of the new arrangement from Devers. He testified at one point that he spoke about it with Devers because "he was the first man I came across"; and, at another, because "Jim knows about everything"—"he talked to everybody." Geissel, like Parrent and Ingram, denied knowledge that Devers was the steward.[6]

Geissel testified that he was not "really surprised" at the outcome of the August 11 meeting, and would have agreed to it himself had he been present. He conceded, however, that while Respondent had intended to enlarge the complement, this accelerated that development, perforce increasing payroll overhead earlier than planned. Further regarding the increased complement, Geissel testified, "To me it is featherbedding," later explaining that he had in mind his perception that Devers (and Orloff) wanted the larger crews so he could be a nonworking foreman.

The next day, August 12, Geissel told Ronald Croxton, Devers' successor as the Union's business manager,

---

convey directives to the crews. There is no convincing evidence, however, that Devers (or Orloff) was other than a conduit in this regard, or that he otherwise exercised any significant degree of independent judgment in his role as foreman.

It is concluded, therefore, that Respondent has not met its burden of proving Devers, as foreman, to be a supervisor. *Payne & Keller, Inc.*, 258 NLRB 892 (1981), *Commercial Movers, Inc.*, 240 NLRB 288, 290 (1979).

[3] The weight of evidence leaves no doubt that substantial portions of the work were to be done in difficult terrain. Devers described the terrain as "very mountainy," insisting that the photographs in evidence are "very deceiving"—"It looks flat [in the photos], but, believe me, it is not." Ron Parrent, Respondent's estimator, testified that some areas were "very rough," and that there was "a lot of flat land, as well." Edward Cosgrove, and one of Orloff's crew, described one small area of the job as "flat" and "nice," with "the rest of the job [being] awful hilly." Ingram testified that, "prior to [Devers'] discharge, all the terrain is on flat land." As it later developed, Ingram's credibility was not impressive.

[4] Devers is credited that he voiced the need for larger crews to Ingram from time to time, and that Ingram responded as here set forth. Ingram testified at one point that Devers "complained to me about needing bigger crews, but not necessarily safety," only to admit, "We talked about it being unsafe." He testified at another point that he and Devers had "talked about" crew size, but that Devers had not complained; at still another that "somebody mentioned not being enough met to set the poles," but that he did not know who, "possibly" Devers; and, finally, that he could not recall if anyone ever asked for large. crews.

[5] The contract covering line construction work stated that a foreman "shall not perform any work with the tools if more than two (2) linemen are at work on his crew . . ."; that covering oilfield construction work stated: "A foreman may work with the tools until five (5) journeymen, not including himself, are employed on the job."

[6] Edward Cosgrove, a member of Orloff's crew, testified that he heard Devers declare himself to be steward, in Ingram's presence, on Cosgrove's second day on the job. Cosgrove said he was "not positive" that Ingram heard Devers, adding, "if he was deaf, I guess he couldn't hear." Ingram, at pains to support his assertion that he did not know, testified that Devers was "not necessarily" the employees' most vocal spokesman and that he, Ingram, was "not saying anyone was vocal." Ingram finally conceded, however, that "possibly [Devers] did [have the most to say], yeah."

that Respondent was going "to let Jim go." Geissel testified that Respondent has a "policy" of sometimes informing the Union of pending discharges, "depending upon who it is." He elaborated that it was done in this instance because Devers "was a local member and . . . an ex-business administrator"; that "he held high esteem with the local"; and that Respondent was "trying to avoid some of the problems that could be involved with it." Geissel continued that Respondent tries to tell the Union "at least a little bit before" any member of the local is to be discharged, so the Union will "be prepared when he comes in."

Regardless, Geissel explained to Croxton that the reasons for the action were that Devers had "a negative effect on the people on the job"; that Respondent had "no control over the job" because of Devers' "influence over the people"; and that production from Devers' crew "was not there." Croxton asked if Geissel had "confronted" Devers about these matters, saying that he "is a reasonable person if he knows that this is a problem." Geissel answered that he had not. Croxton remarked on the "poor timing" of the discharge—presumably an allusion to the just-settled dispute over crew size; and Geissel countered that it was "just a necessity."

Devers himself received word at the end of his shift on August 12. Ingram gave him a termination slip along with his regular weekly paycheck. August 12, being a Tuesday, was payday. The termination slip gave no reason, instead saying "letter will follow" in the space for that purpose. Devers, "very surprised," asked Ingram if it had to do with his work. Ingram replied that Devers' work had been "all right," then expanded that the decision had come "from the office" and that he was "not going to get involved in a fight between [Devers] and the office."[7]

The next day, August 13, the linemen refused to go to work, protesting, if not the discharge itself, the manner in which it had been effected. Fitts and Croxton met with Geissel and Ingram at the site, in hopes of getting the employees back to work. Fitts asked why the discharge. Geissel cited "lack of production" and "Jim's attitude." Geissel then tendered the letter to follow mentioned in the termination slip, acknowledging that this was "a very poor way" to handle the situation. The letter stated:

> Jim Devers has been on the job for approximately one month and has been given ample time to produce some leadership which we feel is important on this or any other job.
>
> We have observed Jim and feel that we are receiving poor production from his crew. We would not want him on this job or any other job for Humes Electric, Inc. We have discharged him on the 12th day of August, and he is not eligible for rehire. We would like your careful attention to this problem.

Fitts proposed, since the letter-to-follow procedure concededly was a poor one, that "let's just tear this letter up." Geissel complied, after which they discussed Devers' being rehired. Geissel expressed Respondent's willingness to hire him for other jobs—"if it would help the [Elk Hills] job along and [get the men to] go back to work." But, regarding the Elk Hills job, Ingram was adamant in his opposition, saying "time and time again," as Fitts recalled, that "it just wouldn't work." Ingram explained, according to Croxton, that Devers' influence over the crew was "a negative factor"; that "the job was actually being run by Jim Devers"; and that "production on the crew wasn't up to what . . . it should be." Geissel, more conciliatory, concluded the meeting by saying he would discuss the matter with Charles Reed, Respondent's owner and president, and "get back to" Fitts.

In the aftermath of the meeting, and despite Fitts' urging, only two of the linemen returned to work.

The next day, August 14, Geissel told Fitts he had spoken with Reed, and that Reed had said he would fire Geissel if Geissel were to rehire Devers at Elk Hills. Also on August 14, Geissel sent this letter to the Union, less far-reaching on the issue of rehire, in lieu of the one torn up by Geissel:

> I have discharged Jim Devers for non-production.
>
> We feel that we have given him a fair chance to improve with no results.
>
> We would not want Jim back on this job.

Fitts, Croxton, Geissel, and Ingram met again a few days later. Croxton testified that this meeting "went very much as the previous one did." Devers never was offered rehire.

Ingram and Geissel testified in largely parallel terms that they conversed in Respondent's Taft office after the workday on Tuesday, August 5, about the need to do something about Devers' poor production. According to Ingram, Geissel said Respondent would "just have to let him go if he can't cut it," but then agreed with Ingram's suggestion that Ingram "talk to [Devers] . . . [and] . . . give him a chance." Geissel told it somewhat differently, testifying that, when Ingram raised the issue, he asked if Ingram had spoken to Devers about it; that Ingram replied that he had, "more or less"; and that he, Geissel, counseled that that "wasn't sufficient" forewarning if discharge was contemplated. James Pence, a general foreman, testified more consistently with Ingram than Geissel, relating that he overheard Geissel say to "tie a can to" Devers. Pence, however, stated that this happened during the last week in July.

Ingram testified that he spoke with Devers about production the next day, August 6, when Devers "happened

[7] This is Devers' credited version of Ingram's remarks. What Ingram said was that it was a front office decision, and that it was indeed is suggested not only by Devers' credible testimony, but also by Geissel's testimonial reference to an August 13 meeting as being "the day after I fired Jim"; by an August 14 Geissel letter to the Union stating, "I have discharged Jim Devers"; and by Geissel's August 14 disclosure to the Union's Fitts that Charles Reed, Respondent's president and owner, had said he would fire Geissel should Geissel rehire Devers.

Ingram, denying that he told Devers that performance had nothing to do with the discharge, testified that, when Devers asked for a reason, he answered, alluding to Devers' poor production, "What have we been talking about?" Ingram's testimony in this regard, as in others noted elsewhere, was not convincing.

to be in" the job trailer "close to quitting time." Ingram assertedly stated:

> The Navy is getting concerned, I am getting concerned, Humes Electric is getting concerned about this [production]. They are bugging me, wondering when we are going to go on the contract.[8]

Devers' response, according to Ingram, was, "F— those people."

Devers, while unable to fix the date, concedes that Ingram once told him that he did not think he was "producing." Devers testified that, getting "mad right quick," he protested, "Goddamn it, I have set four poles today"—"a hell of a good day's work."

After work the afternoon of the 6th, according to both Ingram and Geissel, Ingram told Geissel of his exchange with Devers, observing that Devers' "attitude" was "pretty bad" and recommending discharge. Their recitals continued that they then decided to discharge Devers after work the next day, August 7. Geissel testified that Respondent has a strong policy of effecting discharges, even for cause, on paydays, making exceptions only for "misconduct, thievery, drinking on the job, just outrageous conduct." He further testified that Devers' obsence reaction— "f— those people"—was sufficiently "outrageous" to come within the exception. He explained:

> After you have been admonished about your work and you have been told that you are not doing production . . . [you] usually don't come across that way, no. Usually you take your lumps and you like them.

As previously stated, the discharge in fact did not take place on August 7, but on the next payday, Tuesday, August 12. Nor was the Union informed of an impending discharge or a final check prepared before August 12. Ingram and Geissel both testified that the timing was upset by Devers' missing work on August 7 and again on August 8 because of illness. Explaining why he was not discharged on Monday, August 11, Ingram testified: "Normally, when you terminate someone, we try to do it on a regular payday if it goes into the next week like that . . . to simplify the bookwork." Similarly, Geissel testified that, by Monday, it was "felt we could live with it for one more day" in view of the "burden on the women in the office to have to stop everything they are doing and write a specific check."

Asked why the plan was to discharge Devers after rather than before work on August 7, Geissel testified that, although "a lot of" Devers' work had to be redone, it "possibly" would have been more economical to get another day's work from him rather than pay him the required showup time for doing no work.[9]

Asked, then, why he did not tell Devers he was fired when Devers called him in the early morning of August 7 to say he was sick,[10] Geissel testified: "I try to leave that up to the foreman." Explaining why, in that event, he did not instruct Ingram to convey the word to Devers at home, Geissel testified that "it is usually our practice" to wait until an employee is on the job before telling him—even though it means "either paying showup time . . . or paying him for another day of labor when his labor isn't appreciated." Geissel hastened to add, when it was suggested that this practice is "a little bit puzzling": "You have to stop and consider who we are talking about, also." He elaborated:

> We are talking about Jim [Devers]. He holds a high esteem over there, you know. He is an ex-B.A. He is fairly well liked over the area and, consequently, it is pretty hard to fire somebody without giving them a chance, which I thought we did. When they are your friends, also, it is pretty hard to just outright can them. I have fired a lot of people, and some of them I could[n't] care less about. Jim I cared about.

Seeking to demonstrate the poor productivity of Devers and his crew, Ingram testified at considerable length about their work—when, where, and how. While so doing, he replied on two diagrams of the site he had prepared the day before. He conceded that "things went smooth" the first workweek July 14 to 18. He asserted that he first raised the issue of production with Devers "possibly" on July 22, while telling him and "possibly" Dunsworth and Paynter that they had not "framed" a pole properly.[11] Ingram later admitted, however, that he could not recall "exactly for sure" if he mentioned production at that time; and that the first time he complained to Devers about production "for sure" was during the exchange previously described, assertedly on August 6.

Ingram testified that he first spoke to Geissel and Parrent about Devers' poor production "toward the end of July," at which time he had "probably" two or three conversations with them. He stated that he could not separately recount those conversations, but that he remembered reporting that production "was down" and that the Navy was getting "a little itchy about getting the contract job started." Asked if any decision was made regarding Devers in those conversations, Ingram replied, "Probably nothing definite"—"you have to give everybody a chance."

Asked how, in preparing the diagrams, he was able to indicate which poles had been set by which crew, Ingram stated that, because he was present when the work was done, "I know in my head who did what." Next asked if job blueprints indicated which crew had

[8] Ingram testified the first several days on the job were taken up with "extra work"—i.e., necessary "odds and ends" not specified in and preliminary to work expressly covered by the job contract.

[9] Both labor contracts provided: "Any person reporting for work and being laid off, not having been notified the previous day of such layoff . . . shall receive not less than four (4) hours' wages for that day."

[10] Devers spoke with Geissel about 6 a.m. on August 7, Geissel having an office telephone in his home, to report that he was ill.

[11] By informal count, Ingram used the qualifying "possibly" no less than 10 times in his testimony—a propensity contributing to his generally poor credibility.

Framing consists of attaching cross-arms to a pole and affixing hardware to them.

done what work, Ingram answered: "No. They might have a checkmark on them, yeah." Asked if he had examined the blueprints "to see if there was a check . . . to indicate" whether a certain pole had been set by Devers' crew, Ingram replied: "I can't recall. Like I said, I know who set who." He added, "I don't recall looking at the checkmarks, but I know in my own mind who set what pole, because I was present."

Asked then if he had used the blueprints to prepare the diagrams, Ingram testified variously that he "might have," that he could not recall "whether I looked at it or not," and that "I looked at it to draw this diagram."

Ingram also testified that the employees timecards reflected "how long it took to put in each particular pole." Asked how, he replied, "They don't show exactly how long," but that he "just remember[ed] it." He then admitted that he could not say "offhand" how long Devers' crew worked at Pole 1; that he could not remember if Dunsworth and Paynter ever returned after leaving the job in protest of Devers' discharge; and that he could not recall if larger crews ever were asked for.

As against Ingram's testimony that "things were smooth" the first workweek, and that he first spoke to Geissel about Devers' production "toward the end of July," Geissel testified that Ingram first complained to him about Devers on July 21—the first day of the second workweek—and that Ingram blamed "Devers himself," not the crew, because the foreman "is the one that determines how much [the] crew does." Geissel averred that, after Ingram's first complaint, he "received a daily complaint from Hack" that Devers "wasn't doing his part of the job."

Geissel testified that he visited the site "on nearly a daily basis"; and that he consequently observed Devers' performance "probably 10 to 12 times," concluding that Devers and his crew "were spending entirely too much time talking, standing around." Geissel elaborated that, on or about July 29, he saw Devers and his crew idly "standing around" for 20 to 25 miniutes. Challenged whether they would loaf so egregiously within his view, Geissel conceded that they "most likely" did see him and that he could not explain their being so brazen.

Geissel testified that he did not admonish them at the time—"that is not my job." Elsewhere, far from speculating that they "most likely" saw him, Geissel testified that he asked them if there were any problems; and, far from disclaiming that he admonished them, he testified that he lectured Devers about "needing some cooperation on the job; that it was a long job and we needed everybody's help to complete it."

Owner/President Reed testified that he happened to mention, during a meeting of fringe-benefit trustees on July 21 or 22, that he had heard that Devers "wasn't performing" after being inactive for 3 years. Reed testified that his information came from Geissel, who had told him sometime previously that Devers was "not doing too well." Geissel said nothing about this in his testimony, although he did testify, as above noted, that Ingram first complained to him on July 21. Ingram, it again will be recalled, testified that "things went smooth" the workweek of July 14 to 18, and that he first complained to Geissel "toward the end of July."

Sometime in the last half of July, Reed telephoned the Union's Croxton about Devers. According to Reed, it happened on July 26, 27, or 28, and he asked if Croxton had "any ideas" how to get Devers "to come around and be productive." Reed testified that Croxton, noting that Reed and James Pence were "real close," suggested that Reed ask Pence to have a talk with Devers. Croxton recounted that the conversation was in the "second week of July," and that Reed began by saying he "had a problem with" Devers and wondered if Croxton had "a rabbit to pull out of the hat." But then, according to Croxton, when he asked what the "particular problem" was, Reed offered nothing. Croxton went on that he asked Reed if he had "confronted" Devers about it; Reed said he had not; and Croxton said that would be "the best way to handle the problem." Croxton was the more convincing of the two, and is credited.

Reed testified that, a day or so later, Pence agreed to speak with Devers. Asked if he followed up with Pence, or if Pence reported back to him, Reed testified variously: "I think I did"; "I do know that I was told that [Pence] did talk to Devers"; "I think [Pence] told me"; that he "just knew that [Pence] talked to [Devers], although he had no recall of a "follow-up conversation" with Pence; and, finally, "I feel that [Pence] did talk to Devers; he did not report right directly to me, but it came back to me that he had talked to him."

Pence testified that Reed spoke to him on or about August 1, saying he had heard that Devers was not producing and asking if Pence "would talk to him and see if [he] could . . . perk him up." Pence's story continued that, about a week after Reed's request, he had a passing conversation with Devers at the union hall, but that he "decided not to" discuss Devers' job performance. Pence concluded:

> I probably went back to [Reed] and told him that I talked to Jim, but I decided not to say anything about his status as far as being nonproductive.

As mentioned earlier, Pence, who professes to be a "personal friend" of Devers', testified that he overheard a conversation between Ingram and Geissel in late July—i.e., before Reed's request—in which Geissel had said to "tie a can to" Devers.

Reed testified, finally, that he had no part in the discharge decision, but learned about it "before [Devers] became sick"—i.e., before August 7—when Geissel disclosed that he was "going to finally have to let Jim go." Reed added that, although he "hated it, naturally, because Jim and I—good lord, you live and know somebody 30 years—," he said "nothing specific" in response to Geissel's disclosure. It will be remembered that Geissel reported to Fitts on August 14 that he had spoken to Reed about Devers' possible rehire, and that Reed had said he would fire Geissel if Geissel were to rehire Devers at Elk Hills.

Parrent testified that he learned of the discharge decision "the Thursday before" its implementation—i.e., August 7. He elaborated that he "happened" to be at a meeting that day with Geissel and Ingram during which

"it was brought up" that Devers was to be discharged "due to non-productivity."

B. *Conclusion*

It is concluded that Devers' discharge violated Section 8(a)(1) and (3) as alleged. The bases for this conclusion are these:

1. Speaking for himself and his coworkers, Devers complained to Respondent several times, directly and through the Union, of the need to "heavy up" the crews. This activity plainly was protected by the Act, because of both its concerted and its union character.

2. The day before the discharge, as an outgrowth of Devers' protected complaints, a meeting was held between representatives of Respondent and the Union, including Devers, in which Respondent agreed to enlarge its complement, thereby increasing payroll overhead.

The assertions of Geissel and Ingram that the discharge decision was made several days before—on August 6, to be implemented August 7—are rejected. As is elsewhere indicated, both were given to self-serving fabrication, especially Ingram, on points large and small. Beyond that, objective corroborating evidence that the decision was reached on the August 6 is totally lacking, and their testimony concerning the delay in implementation until August 12—because of Devers' absence, then to avoid a "burden on the women in the office"—was singularly unconvincing.

That the decision was made on August 6 also is subverted by Pence's admission that he mentioned nothing of the sort to Devers, a proclaimed "personal friend," when they conversed on or about August 8, even though Pence supposedly had heard Geissel tell Ingram to "tie a can to" Devers sometime before, and supposedly was under instruction from Reed to speak to Devers about his performance.

Furthermore, Ingram's testimony that he spoke to Devers about production on August 6, when Devers "happened to be in" the job trailer "close to quitting time" rather than by prearrangement, in combination with Geissel's disclosure to Croxton on August 12 that Devers had not been "confronted" about his alleged inadequacies, undermines Geissel and Ingram that they decided on August 5 that Ingram should "talk to" Devers and "give him a chance" before resorting to discharge.

3. Apart from the inference to be drawn from the increase in overhead, resentment of Devers' agitation for longer crews is implicit in Geissel's perception—based in part upon Parrent's unsubstantiated remark to him the evening before the discharge—that Devers sought to enlarge the crews so he could be a nonworking foreman; and by Geissel's depiction of this as "featherbedding."

4. Respondent has failed to make out a convincing case that Devers would have been discharged on August 12 regardless of his protected activities. More specifically, Respondent's contention that poor production and a bad attitude unrelated to protected activities were the reasons is discredited by:

(a) Ingram's comments, upon telling Devers he was fired, that his work had been "all right" and that the decision had come "from the office."

(b) Geissel's statement to Croxton, when telling him of the pending discharge, that Respondent had, "no control over the job" because of Devers' "influence over the people"—likely an allusion to the impact of Devers' protected activities.

(c) Ingram's stated opposition to Devers' rehire during the August 13 meeting on the grounds not only that production from Devers' crew "wasn't up to what . . . it should be," but because "the job was actually being run by Jim Devers"—another seeming allusion to the effect of Devers' protected activities.

5. Respondent's citation to poor production as the reason for the discharge is additionally discredited by the weakness of its several witnesses in their efforts to impugn Devers' productivity. Thus:

(a) Ingram's recurrent use of the qualifying "possibly" betrayed most eloquently a proclivity to evade; and his testimony with regard to the site diagrams was so potholed with contradictions, evasions, and selective recall as to be a moonscape of self-impeachment.

(b) Geissel's testimony that, from about July 21 on, he "received a daily complaint" from Ingram about Devers was both devoid of corroboration from the obvious source, Ingram, and effectively contradicted by Ingram's testimony that "things went smooth" in the workweek of July 14 to 18 and that he did not complain to Geissel about Devers until "toward the end of July."

(c) Geissel's recital about seeing Devers and his crew "standing around" for 20 to 25 minutes on or about July 29 was flawed by tell-tale inconsistency—first that they "most likely" saw him and that he did not admonish that because "that is not my job," then that he asked them if there were any problems occasioning their idleness and lectured Devers about "cooperation on the job."

(d) Reed's testimony that he had heard from Geissel sometime before July 21 or 22 that Devers "wasn't performing" was without corroboration from Geissel; and, while not at odds with Geissel's testimony that he received daily complaints from Ingram starting about July 21, flies in the face of Ingram's testimony that "things went smooth" the first workweek, and that he did not complain to Geissel about Devers until "toward the end of July."[12]

(e) Reed's and Pence's testimony that Reed enlisted Pence to talk to Devers about his performance was rendered unbelievable by the vague and contradictory nature of Reed's responses when asked if he had a followup conversation with Pence; by Pence's assertion that, while he did have "a passing conversation" with Devers, he "decided not to" discuss Devers' job performance; and by the vagueness of Pence's testimony that he "probably went back to [Reed] and told him that I talked to Jim . . . ."

6. Respondent's witnesses discredited themselves and Respondent's defense in other ways, as well:

(a) Ingram's insistence that "all the terrain is on flat land" until after Devers was discharged was so at odds

[12] That Reed called Croxton about Devers in July is no less consistent with displeasure over Dever's early comments about crew size than with concerns about production, especially since Reed declined to tell Croxton the nature of the "particular problem."

with the weight of evidence as to reveal an intent to mislead;[13] and his testimony whether Devers spoke to him about crew sizes, with its contradictions and evasions, was another moment of self-impeachment.[14]

(b) Reed's professed sentiment as concerns the discharge—that he "hated it, naturally, because Jim and I—good lord, you live and know somebody 30 years"—was so drippingly overstated as to be blatantly contrived, particularly in light of his threat, as reported by Geissel to Fitts, to discharge Geissel should Geissel rehire Devers.

In summary, the temporal proximity of the discharge to Devers' protected activities, coupled with Respondent's evident resentment of those activities, warrants the inference that they were a motivating factor in the discharge decision; and Respondent's efforts to demonstrate that the same action would have been taken even in the absence of the protected activities, far from overcoming the inference of improper motive, reinforced it immeasurably.

CONCLUSIONS OF LAW

By discharging James Devers on August 12, 1980, as found herein, Respondent violated Section 8(a)(1) and (3) of the Act.

ORDER[15]

The Respondent, Humes Electric, Inc., Taft, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against its employees because of their union or concerted activities protected by the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in their exercise of rights under the Act.

2. Take this affirmative action:

(a) Offer to James Devers immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority and other rights and privileges; and make him whole for any loss of earnings or benefits suffered by reason of his unlawful discharge, with interest on lost earnings.[16]

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its place of business in Taft, California, and at its jobsite at the Elk Hills Naval Petroleum Reserve if it continues to perform at that jobsite, the attached notice marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

---

[13] Evidence regarding the terrain is detailed above in fn. 3.

[14] Ingram's testimony in this regard is detailed above in fns. 4 and 6.

[15] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[16] Backpay shall be computed in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950). Interest shall be computed as prescribed in *Flordia Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[17] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."